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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/577,090	01/19/2007	Tobias Fackler	100728-53-WCG	4311

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NORRIS, MCLAUGHLIN & MARCUS, P.A.
875 THIRD AVE
18TH FLOOR
NEW YORK, NY 10022

EXAMINER	
NELSON, MICHAEL B	

ART UNIT	PAPER NUMBER
1794	

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03/18/2009	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/577,090	FACKLER ET AL.	
	Examiner	Art Unit	
	MICHAEL B. NELSON	1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *26 January 2009*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-24* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-24* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date *02/04/09*.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Response to Amendment

1. Applicant's amendments filled on 01/26/09 have been entered. Claims 1-24 are currently under examination on the merits.

Claim Rejections - 35 USC § 103

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

3. The factual inquiries set forth in *Graham* **v.** *John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.p
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

4. Claims 1-7, 13-16, 18, 19 and 24 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hanada et al. (U.S. 2003/0186039), and in view of Hatke et al. (U.S. 6,239,187).

Regarding claim 1, Hanada et al. discloses a multilayer film is disclosed with a polyolefin (polypropylene) foamed layer and a polypropylene non-foamed layer ([0026]-[0027]). See Fig. 1d, the first foamed layers reads on instant layer A), the first non-foamed layer reads on instant layer B), the second foam layer acts as a coupling agent layer between the first and second non-foamed layers and the last non-foamed layer is a heat sealable and/or peelable surface layer in the sense that polypropylene can be heat sealable or peelable depending on how its heated and applied to other substrates. The overall thickness of the film is disclosed as 1 mm (Table 1, [0139]-[0140]) and the thickness ratio of the foamed to non-foamed layers is disclosed as being between 100:1 and 100:30 (i.e. 1/100 to about 1/3, the second value falling within the claimed range). These thickness parameters fall within and substantially overlap the instant claimed thickness limitations.

Hanada et al. does not disclose that layer (A) contains 2.1 to 20 wt.% or that at least one agent from the group talcum, titanium dioxide, silicon oxide, calcium carbonate, magnesium silicate, aluminium silicate, calcium phosphate and montmorillonite is present as the nucleating agent.

Hatke et al. discloses foamed polyolefin resins for use in foodstuff packaging (See Abstract and C13, L5-25). See C10, L1-5, nucleating agents are disclosed as being added at between 0.01-20 %, preferably 0.1-10%, which completely overlaps the instant claimed ranges,

with the upper preferred endpoint (10%) lying within the claimed range. See C11, L5-10, various nucleating agents are disclosed, inter alia, talc. See C12, L35-45, the foamed polyolefin resin of Hatke et al. exhibits improved heat distortion resistance and excellent mechanical properties.

The inventions of both Hanada et al. and Hatke et al. are drawn to the field of foamed polyolefin packaging films and therefore it would have been obvious to one having ordinary skill in the art at the time of the invention to have modified the foamed polyolefin composition of Hanada et al. by using the nucleating agents in the proportion as taught by Hatke et al. for the purposes of controlling foam cell size and imparting improved heat distortion resistance.

Regarding claims 2-7, 13-16, 18, 19 and 24, Hanada et al. discloses all of the limitations as set forth above. Additionally the reference discloses that the overall thickness of the film is disclosed is 1 mm (Table 1, [0139]-[0140]) and the thickness ratio of the foamed to non-foamed layers is disclosed as being between 100:1 and 100:30 (i.e. 1/100 to about 1/3). These thickness parameters fall within and substantially overlap the claimed thickness limitations of instant claims 2 and 3. See [0026]-[0034], the foamed layer consists of various polypropylene resins and the non-foamed layer also is based on polypropylene. The polymers used include propylene and ethylene block copolymers ([0037]). See [0006], the invention is disclosed as being useful for creating packaging materials for food stuffs, including trays.)

Hanada et al. does not disclose that the foodstuffs be solid or be meat, sausage or cheese however, given that Hanada et al. discloses containers that could be used to contain solid foodstuffs (i.e. trays [0006]), one of ordinary skill in the art would have used the packaging

material to contain all possible solid foodstuffs, including meats, sausages, and cheeses, so as to apply the invention to the greatest possible market.

5. Claims 8-12, 17, 20-23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hanada et al. (U.S. 2003/0186039) in view of Hatke et al. (U.S. 6,239,187) as applied to claim 1 above, and further in view of Laurent et al. (U.S. 6,132,539).

Regarding claims 8-12, 17, 20-23, Hanada et al. discloses all of the limitations as set forth above. Hanada et al. does not disclose that the multilayer film further comprise the additional sequence of layers of instant claims 8-12 or that the film be used on form-fill-seal machines.

Laurent et al. discloses a multilayer film further comprising the sequence of layers of instant claims 8-12 and to be used on form-fill-seal machines.

(See Fig. 3, C4, L10-35, the multilayer stack, A, is disclosed as lying on top of a foamed polyolefin packaging film, B. The multilayer stack, A, comprises, in order from the surface of the foamed polyolefin substrate to the exposed surface: a bonding layer made of polypropylene, 14, a coupling agent layer made of a propylene copolymer, 12, a barrier layer made of ethylene-vinyl-alcohol, 11, a second coupling agent layer made of an ethylene copolymer, 13, and a heat sealable or peelable layer made of low density polyethylene, 15. The bonding layer and the foam layer are both made of the same polyolefin monomer (polypropylene, C3, L40-50). The total thickness of these layers ranges from 31 micrometers (i.e. 10+3+3+10+5) to 85 micrometers (i.e. 50+5+5+10+15), with the lower endpoint of the range, 31 micrometers lying within the range. See C1, L1-35, the invention is disclosed as being used with form-fill-seal machines.)

The inventions of both Hanada et al. and Laurent et al. are drawn to the field of foamed polyolefin packaging films and therefore it would have been obvious to one having ordinary skill in the art at the time of the invention to have modified the multilayer film of Hanada et al. by adding the barrier layer containing stack of Laurent et al. for the purposes of imparting advantageous barrier properties to the packaging film.

Response to Arguments

6. Applicant's arguments filled on 01/26/09 are moot in light of the new grounds of rejection which were necessitated by applicant's amendments. Arguments which are still deemed to be relevant are addressed below.

7. Regarding applicant's arguments directed against the exposed nature of some of the layers of the prior art, the examiner notes that the stack of layers depicted in Hanada et al. Fig. 1d, show the layers comparable to instant layers A and G as the exposed (i.e. outer or surface) layers (See rejection above).

8. The examiner further notes that the applicant mentions that the instant layer B is never mentioned as being a surface layer nor is it mentioned as containing filler. While the examiner agrees with the statement, the first non-foamed layer of the stack in Fig. 1d is also not a surface layer. More to the point, the fact that the instant layer is not claimed as being a surface layer or containing filler does not preclude the prior art from containing filler and yet still reading on the instant limitations (this point being moot with regard to the surface layer property since the prior art discloses the layer in a non-surface position). In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies are not recited in the rejected claim(s). Although the claims are

interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

9. The examiner does not agree that a filler amount of 20 to 50% would prevent a polypropylene layer from being used as a heat seal or peel layer on other surfaces.

10. Regarding applicants arguments against the thickness ratios, while the prior art does in fact read on the instant claims (i.e. 100:30 is within the range of 6:1 and 2:1, see rejection above), the relative thickness of the layers would have been adjusted by one having ordinary skill in the art to optimize the relative properties of the individual layers in the final product (i.e. the foam layer could be made more or less thick to impart more or less cushioning).

11. Regarding applicant's arguments against Hanada et al. not disclosing the instant production benefits, firstly it is noted that no such production benefits are instantly claimed. In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993). Secondly, the fact that Hanada et al. does not specifically disclose the instant production benefits does not preclude the film of the prior art from possessing these qualities.

12. Regarding applicant's arguments against the combination of Hanada et al. and Hatke et al., the Hatke et al. reference is directed to a polyolefin (i.e. polymerized resin containing double bonded carbon chains) foamed resin and is therefore considered analogous art to Hanada et al. Regarding applicant's arguments that the cycloolefins of Hatke et al. are not substitutable for the

polypropylenes used in Hanada et al., the examiner was not using the Hatke et al. reference to substitute the resins but rather to teach using more than 1% nucleating agent. The amount of nucleating agent would not be something that is particular only to cylcoolefins. Also, the examiner notes that in addition to the explicit teachings of Hatke et al., one having ordinary skill in the art would have found it obvious in general to have adjusted the amount of nucleating agents in a resin foam mixture in order to optimize the size of the foam cells produced therein.

Conclusion

13. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

14. Any inquiry concerning this communication or earlier communications from the examiner should be directed to MICHAEL B. NELSON whose telephone number is (571) 270-3877. The examiner can normally be reached on Monday through Thursday 6AM-4:30PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, David Sample can be reached on (571) 272-1376. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/David R. Sample/
Supervisory Patent Examiner, Art Unit 1794

/MN/
03/03/09